Supreme Court, U. S.
FILED
SEP 25 1980
MICHAEL RODAK, JR., CLERK

80-484
No.

IN THE
Supreme Court of the United States
October Term, 1980

PRINCE EDWARD SCHOOL FOUNDATION,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September 1980

QUESTIONS PRESENTED FOR REVIEW

I

Whether a tax exemption revocation proceeding of the Internal Revenue Service imposed conditions which altered a prior ruling of this Court.

II

Whether the constitutional validity of such a proceeding is an issue in a court review under 26 U.S.C. Sect. 7428.

III

Whether petitioner had a First Amendment right to refuse to adopt and advertise a policy of non-discrimination which had been required by the Internal Revenue Service as a condition for retaining petitioner's tax exempt status.

IV

Whether, in the absence of any evidence, a transfer to petitioner of the burden of proof of non-discrimination was a denial of petitioner's right to administrative due process.

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[1]Rule 21.1(b): The only parties to this proceeding are those listed in the caption. The government agency concerned is the Internal Revenue Service. The parties are referred to as "Prince Edward" and the "Service" in this petition.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

On June 30, 1980 the United States Court of Appeals for the District of Columbia Circuit in an unreported decision affirmed *per curiam* the finding of the District Court that

> "[Prince Edward] has failed to meet its burden of establishing that it is an organization described in Section 501(c)(3) and entitled to tax exempt treatment. " (App. 1a)

The holding thus affirmed was reported at 478 F.Supp. 107 (D.D.C. 1979), (App. 3a). It sustains an order of the Internal Revenue Service revoking Prince Edward's tax exemption (App. 16a) for the school's failure to sustain a burden of proving non-discrimination in student admissions.

JURISDICTION

The jurisdiction of this Court to review the June 30, 1980 holding of the Court of Appeals by writ of certiorari is given by 28 U.S.C. § 1254(1), this petition being filed within the ninety-day time period provided in 28 U.S.C. § 2101(c).

STATUTES INVOLVED
(Pertinent text printed in Appendix)

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STATEMENT OF THE CASE

1. Prince Edward School Foundation is a non-profit organization located in Prince Edward County, Virginia.

Its sole activity is the operation of a private school, Prince Edward Academy, (App. 30a). Historically, the record shows that it was organized in 1959 shortly after the public schools in that county had been closed (App. 23a) and in 1964 was described by this Court as having been established for the purpose of preserving racially separate education for former white public school students, *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218, 233, 231 (1964); (App. 11a). Economically, the school has had no reportable income since its founding, (App. 23a), receiving necessary support from gifts which are tax exempted under 26 U.S.C. § 170(c)(2).

Despite popular assumption to the contrary, Prince Edward does not now have and as a matter of fact, has never had, any formalized policy which would restrict student admissions on the basis of race, (App. 10a). It is equally true, however, that as a consequence of its cost, its reputation, or otherwise, it has never had a black pupil in its student body, having never received an application for admission from a black student, (App. 10a). Since such a situation could justify an inference or assumption that Prince Edward has an implacable resistance to school integration, the school assumed the burden of showing that no person to its knowledge had ever acted so as to prevent or discourage the filing of such an application, (App. 49a). No evidence to the contrary is shown by the record, and no proof of any discriminatory act by the school has been shown, (App. 10a).

Whatever the case might have been in earlier years under Virginia law if an application had been received from a black pupil, the question of Prince Edward's loss of any right to adopt a white only admissions policy was determined in July 1973 when Judge Bryan, sitting in the Eastern District of Virginia, enjoined some 395 private schools—including Prince Edward— to thenceforth admit

black applicants on the same basis as white, *McCrary* v. *Runyon,* 363 F.Supp. 1200. That order was affirmed by the Fourth Circuit Court of Appeals, 515 F.2d 1082, and further affirmed by this Court in 1976, *McCrary* v. *Runyon,* 427 U.S. 160. Prince Edward has since that date been available for the admission of any qualified student without limitation on racial grounds, (App. 49a).

2. As originally established, Prince Edward met the standards of an educational organization as described in 26 U.S.C. § 170(b)(1)(A)(ii), (*id.* 26 C.F.R. 1.501-1(d)(3)).[2] In 1959 and 1960 it received Service recognition of its tax exempt status under 26 U.S.C. § 501(c)(3) and its consequent right to receive tax-exempted gifts under § 170, (App. 22a). Until the revocation here complained of in 1978, the school's name was thereafter printed in the Service's *Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code* as a tax-exempt foundation to which donations could be made on a tax exempt basis. Such gifts have since constituted the school's principal financial support. Outside of the effect of the *McCrary* order, no change of any kind has been made in the school's operation.

3. Up until July 1970 the Service held that the language of 26 U.S.C. § 501(c)(3) required it to recognize the tax exempt status of private schools without regard to any ethnic admissions limitation they might have. This position was reversed during the course of a three-judge trial in *Green* v. *Connally,* 330 F.Supp. 1150 (D.D.C. 1971), in which the Service was the defendant and the private schools —

[2]The legislative history of §§ 170 and 501 is detailed in footnotes 1 and 2 in 416 U.S. 752 at p. 754, *(Alexander* v. *"Americans United").*

including Prince Edward – were intervenors. The revised Service position was announced to that Court and released to the newspapers to the effect that thenceforth non-discrimination in private school admissions would be made an additional pre-condition for tax exemption under 26 U.S.C. § 501(c)(3), (App. 34a).

The *Green* court adopted this reversal of position by the Service, and this Court affirmed the holding without further opinion, *Coit* v. *Green,* 404 U.S. 997 (1971). Subsequently, in *Bob Jones University* v. *Simon,* 416 U.S. 725 (1974), the *Coit* ruling was held to be without precedential weight (p. 741, ftn. 11) because the change of position was made by the Service in the course of the *Green* litigation.

The question would appear to be an open one at the present time but for purposes of this petition non-discrimination as a condition of tax exemption is accepted *arguendo* by Prince Edward.[1]

4. The new position of the Service on § 501(c)(3) was formalized in the following year as Revenue Ruling 71-447 (1971-2 C.B. 230), (App. 36a), based on "public policy,"

> "Although the operation of private schools on a discriminatory basis is not prohibited by Federal statutory law, the policy of the United States is to discourage discrimination in such schools." (App. 39a)

To effectuate 71-447 the Service issued Revenue Procedure 72-54 (currently Rev. Proc. 75-50 (1975-2 C.B. 587), App. 39a). This Procedure – which is said not to be a regulation – details the steps a private school must take

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[1] *Cf.* 26 U.S.C. § 501(g) which adds a non-discrimination requirement to § 501 but solely with respect to fraternal societies exempted under § 501(c)(7).

to satisfy the Service requirements for recognition of a 501(c)(3) exemption, including the burden of establishing that the school had adopted a non-discriminatory admissions policy and had advertised this action to the community through the newspapers or by radio broadcast.

Prince Edward declined to so advertise and has refused to recruit token black students for the purpose of proving non-discrimination.

5. In 1976 the Service audited Prince Edward's information return for the fiscal year 1974, considered its failure to adopt or advertise a non-discriminatory admissions policy, and concluded,

> ". . . it was determined that the Foundation has not met the requirements to show affirmatively that the school has adopted a racially nondiscriminatory policy as to students or that such policy has been made known to the general public."

The auditor's recommendation was to revoke Prince Edward's exemption. This proposal was adopted (App. 27a) and affirmed on review,

> "Rev. Proc. 75-50, 1975-2CB587, sets forth guidelines and record-keeping requirements for private schools to follow in demonstrating that they have the racially non-discriminatory policy described in Rev. Rul. 71-447 as necessary to exemption under § 501(c)(3) of the Code. Rev. Proc. 75-50 and its predecessor Rev. Proc. 72-54, 1972-2CB834 were designed to require private schools to provide information relevant to our determination of exemption under § 501(c)(3) of the Code. The authority for our re-

> quiring this information comes from § 6001 and § 6033 of the Code.
>
> . . .
>
> ". . . based on the fact that the Prince Edward School Foundation has not taken any of the affirmative action requirements as outlined in Revenue Procedure 72-54 and 75-50, we conclude that their exemption should be revoked."
>
> (App. 24a, 26a)

Following national office review the revocation order was then issued,

> "Based on the fact that you have not complied with the requirements of Revenue Procedure 75-50 nor any of its guidelines that preceded it and have not demonstrated that you have adopted a racially nondiscriminatory policy as to students, we conclude that your federal income tax exemption under section 501(c)(3) of the Code should be revoked with retroactive effect to all taxable periods beginning after November 30, 1970."
>
> (App. 18a)

The revocation was then published, (IRS Bull. #40, p. 17, Oct. 2, 1978; App. 16a).

6. Having exhausted the administrative process, Prince Edward brought this action in the United States District Court for the District of Columbia under 26 U.S.C. § 7428 for a declaratory judgment to review the Service proceedings. Since there were no facts at issue, cross motions for summary judgment were filed by both Prince Edward and the Service.

On the motions Prince Edward introduced proof that the position asserted by the Service's auditor was that a

decision by this Court would not be sufficient to abate the additional Service conditions under 75-50 that Prince Edward must either show that it had adopted and advertised a policy of non-discrimination or have its exemption revoked (App. 59a).

The position so taken by the Service was adopted by the District Court and applied against the school on the ground that § 7428 had given the Court the jurisdiction to make a *de novo* redetermination of Prince Edward's tax exempt status, rather than merely a procedural review. From this the Court saw validity or invalidity of the Service revocation proceedings as being irrelevant:

> "Even if presented with an invalid procedure, however, the decision for resolution by this court remains whether [Prince Edward] is a tax-exempt organization under section 501(c)(3) . . . In the context of this case [the school's] constitutional claims are not material.[3]
>
> . . .
>
> "[3]We reject [the school's] contention that Revenue Procedure 75-50 is invalid and in contravention of the First Amendment, the Due Process Clause, the APA, and the Service's own regulation, 26 CFR § 601.201(n)(6)(ii). We also reject as immaterial [the school's] argument that Revenue Procedure 75-50 is void because its purpose is political rather than revenue producing or because it is not authorized by any section of the Code." (App. 9-10a)

The District Court held that *Green* v. *Connally,* as affirmed by this Court in *Coit* v. *Green,* conclusively determined that racial non-discrimination in private school admissions was a pre-condition to recognition of a tax exemption under § 501(c)(3), (App. 8a), and accordingly, the revocation order must be sustained in the absence of any

evidence pro or con since it was for the school to assume the burden of showing that it had changed from a discriminatory admission policy to a non-discriminatory one, (App. 11a).

It was found that the prior existence of a policy of racial discrimination on the part of Prince Edward had been established by a concession it had made in the *McCrary* case and its burden of proof therefore was to demonstrate that it had thereafter "changed" that policy:

> "Plaintiff argues that, because it is subject to the injunction issued in *McCrary* v. *Runyon, supra,* we should conclude that its admissions policy is non-discriminatory. We find no reason to draw such a conclusion from the plaintiff's participation in *McCrary*. On the contrary, it would appear incumbent upon the plaintiff, given its concessions [4] that its policies were at one time discriminatory, to establish that it has subsequently reversed that policy." (App. 11a)

Prince Edward then appealed to the United States Court of Appeals for the District of Columbia Circuit on May 15, 1979, which affirmed *per curiam,*

> "ORDERED AND ADJUDGED by this Court, that the judgment of the District Court appealed from in this cause is affirmed. We concur in the district court's finding that 'plaintiff has failed to meet its burden of establishing that it is an or-

---

[4]The only admission found on this appears to be the statement of Mr. Justice Stewart that among the 395 schools affected by the *McCrary* order

> "It is stipulated that many of these schools deny admission to negroes." (427 U.S. 160, 164)

ganization described in section 501(c)(3) and entitled to tax exempt treatment.' " (App. 1a)

From that ruling Prince Edward petitions for review by writ of certiorari in this Court.

ARGUMENT

I

Neither the Service nor the Reviewing Courts Below Can Alter or Amend an Order of This Court

A non-constitutional basis for the allowance of this petition is that the rulings of the Service and the Courts below have the necessary effect of altering the 1973 order of Judge Bryan as affirmed in 1976 by this Court in *McCrary* v. *Runyon, supra.*

It is hornbook law that an agency alteration of a court order is invalid.

> "It has also been the firm and unvarying practice of Constitutional Courts to render no judgments not binding and conclusive on the parties and none that are subject to later review or alteration by administrative action. [citing cases]"
>
> *Chicago & S.A. Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103 at 113 (1948)

Under the *McCrary* order, Prince Edward – among others – was required to admit black applicants on the same basis as white students. The school was permitted, however, to teach the value of segregated education while being forbidden to limit its admissions on racial grounds.

> ". . . parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is

> desirable and . . . the children have an equal right to attend such institutions. But it does not follow that the *practice* of excluding racial minorities from such institutions is also protected by the same principle."
>
> *McCrary* v. *Runyon, supra.*

This distinction between the First Amendment right to retain a personal belief and the unprotected practice of restricting the school's admissions has been nullified by the policy adoption and advertising requirements of Rev. Proc. 75-50, which, as described by the District Court, calls upon Prince Edward

> ". . . to publicly avow a non-discriminatory admissions policy. . ." (App. 9a)

The method of such avowal is detailed in Rev. Proc. 75-50:

> "[4].03 . . . The school must make its racially nondiscriminatory policy known to all segments of the general community served by the school.
>
> "1 The school must use one of the following two methods to satisfy this requirement:
>
> "(a) The school may publish a notice of its racially nondiscriminatory policy in a newspaper of general circulation . . . repeated at least once annually . . .
>
> "(b) The school may use the broadcast media to publicize its racially nondiscriminatory policy . . .
>
> * * *
>
> "[4] .08 . . . Failure to comply with the guidelines will ordinarily result in the proposed

> revocation of the exempt status of a school in accordance with the procedures set forth in Rev. Proc. 72-4, 1972-1 C.B. 706."

75-50 also provides that in addition to adopting and advertising such a policy,

> "[2] .02 A school must show affirmatively . . . that since the adoption of that policy it has operated in a bona fide manner in accordance therewith." (App. 40a)

In other words, the policy/practice distinction which this Court made in *McCrary* on constitutional grounds has been altered by 75-50 to become a single joint requirement, proof of which was made a condition of Prince Edward's retention of its tax exemption. This significantly alters the prior court ruling and it was accordingly patent error for this combined standard to be enforced as a single unit against the school. To the extent that the revocation proceedings taken against plaintiff diminished the judicial distinction between practice and policy, they constitute an impermissible collateral attack on the *McCrary* ruling.

II

The Validity of the Service's Demand Upon Prince Edward to Adopt and Advertise a Policy of Non-discrimination as a Condition to the Retention of Its Tax Exempt Status Under 26 U.S.C. § 501(c)(3) Was at Issue Before the District Court.

This appears to be the first case to be brought before this Court which turns on the interpretation of the language of 26 U.S.C. § 7428 (App. 45a). The Congressional basis for that enactment in 1976 — and the cor-

relative amendment to the declaratory judgment statute 28 U.S.C. § 2201 — has been described by the District Court:

> "The enactment of Section 7428 was Congress' response to two Supreme Court decisions denying equitable injunctive relief to organizations seeking to restrain the IRS from withdrawing favorable tax-exempt ruling letters. H.Rep. No. 94-658, 94th Cong., 1st Sess. 282 (1976); S.Rep.No. 94-938, 94th Cong., 2d Sess. 585 (1976); see *Bob Jones University* v. *Simon*, 416 U.S. 725 (1974); *Alexander* v. *"Americans United" Inc.*, 416 U.S. 752 (1974).
>
> . . .
>
> "While providing a remedy to organizations for contesting the Service's tax-exempt status classifications, Congress apparently contemplated that the judicial proceedings would be limited to a judicial review of the Service's ruling for error primarily based upon the administrative record and evidence presented by the organization to the Service." (App. 6-7a)

Despite this reading of § 7428 as calling for a review based on the administrative record, the Court held that the proper issue for a court under the statute was to inquire whether facts existed to establish a *de novo* redetermination of Prince Edward's tax exempt qualification under § 501(c)(3), and from that point of view any questioning of the validity of the Service demand was irrelevant:

> "Even if presented with an invalid revenue procedure, however, the decision for resolution by this court remains whether [Prince Edward] is a tax exempt organization under section 501(c)(3). Our ruling upon the constitutionality and

> statutory validity of Revenue Procedure 75-50 will not affect our ultimate resolution of that question. Revenue Procedure 75-50 simply presents a 'litigating position' for the service and does not bear on our interpretation of section 501(c)(3)'s prerequisites and [Prince Edward's] failure to meet these requirements." (App. 9a)

Moreover, it was for Prince Edward to bear the burden of proof involved:

> "The burden of establishing whether [Prince Edward] is an organization described in section 501(c)(3), furthermore, rests with [Prince Edward]" (App. 7a).

As a result the school lost its eighteen-year tax exempt status for its inability to produce affirmative evidence of non-discrimination, having neither accepted or declined any application from a black student.

> "Notwithstanding the absence of direct evidence in either party's favor, it remains [Prince Edward's] burden to establish that its policy is to admit black students on the same basis as those of other races" (App. 10a),

a test which both Courts then found Prince Edward had failed to meet, (App. 1a, 13a).

It is true that the language of § 7428 makes no distinction between initial and "continuing qualification" in authorizing the courts to issue a declaratory judgment reviewing the Service proceedings. It may also be true that an applicant for the initial recognition of a tax exempt status under 501(c)(3) does carry a burden of establishing the elements of its qualification pursuant to a valid Service

condition, *Houston Lawyer Referral Service* v. *Commr.*, 69 T.C. 570 (1978).

But if § 7428 holds that an existing exemption can be revoked by assumption, without evidence pro or con, then it would contradict the constitutionally significant provisions of the Administrative Procedures Act which provide that an administrative determination unsupported by substantial evidence shall be set aside (5 U.S.C. § 706-2E), *In re Carter,* 177 F.2d 75 (CADC 1949), *cert. den.* 338 U.S. 900.

In other words, even though no such distinction is spelled out in the language of § 7428, it seems patent that the "declaratory judgment" there authorized must be a *review* of whether the agency procedure was proper. If that is the meaning of § 7428, then, whatever burden of proof might be appropriate in the case of an initial exemption qualification under 501(c)(3), it would not follow that a revocation of a pre-existing exemption would be measured by the same agency standard. And if not, then it would be incumbent on the agency to produce at least some evidence to support its action in order to keep its decision within constitutional bounds, (5 U.S.C. § 706-2B).

In other words, if review of the agency's action is the essential purpose of § 7428, then the legality of the Service's revocation procedure was in issue before the District Court, and the contrary conclusion that the Court had been given a *de novo* review jurisdiction by § 7428 was an unjustified reading of that provision, *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402 (1971).

In turn, if the validity of Rev. Proc. 75-50 was an issue before the lower Court, then the question of whether the Service demands were constitutionally permissible was the primary review question, not an irrelevant consideration.

III

The Revocation Procedures of the Service As Applied to Prince Edward Were Unconstitutionally Void.

The revocation or else demand made by the Service on Prince Edward to adopt a "policy," and to advertise and "maintain" it, constituted a requirement that the school adopt and advertise a belief in non-discrimination in education. However heretic a belief in the values of separate education may seem, it is a belief which the school's directors are constitutionally privileged to hold, whatever the school's admissions practice might have to be. To adopt, as the lower courts did, the terms of Rev. Proc. 75-50 as the measure of Prince Edward's conformance to § 501(c)(3) constituted an action in conflict with prior holdings of this Court as to the content of the First and Fifth Amendments.

The obligations placed on Prince Edward by the Service were invalid, first, as a violation of the school's right under the First Amendment to maintain silence on a matter of belief, and second, its right under the Fifth Amendment to insist that some substantial evidence be produced against it before taking away its exemption.

A. Prince Edward Has A Constitutional Right to Refuse to Advertise

Prince Edward's right to refuse to advertise on a matter of belief has been explained in *Wooley* v. *Maynard*, 430 U.S. 750 (1977):

> "We begin with the proposition that the right of freedom of thought protected by First Amendment against state action includes both the right to speak freely and the right to refrain from

> speaking at all. See *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 633-634, 645, 63 S.Ct. 1178, 1182-1183, 1188, 87 L.Ed. 1628 (1943). A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.' *Id.*, at 638, 63 S.Ct., at 1185."

Wooley continues the line of authority which protects the First Amendment right of the individual to remain silent on a question of belief,

> ". . . however noxious and reprehensive that philosophy may be."
>
> *Collin* v. *Smith,* 447 F.Supp. 676 (N.D.Ill. 1978)

E.g.: *Speiser* v. *Randall,* 357 U.S. 513 (1958), (California cannot condition a tax exemption on the giving of a loyalty oath); *West Virginia Board of Education* v. *Barnette,* 319 U.S. 624 (1943); *Russo* v. *Central School District,* 469 F.2d 623 (2d Cir. 1972), *cert.den.* 411 U.S. 932, (students cannot be required to recite an oath of allegiance as a condition to receiving public education).

In *Lamont* v. *Postmaster General,* 381 U.S. 301 (1965), a statute was held to be void under the First Amendment where it required a written request to receive what the post office considered to be "communist political propaganda":

> "We rest on the narrow ground that the addressee in order to receive his mail must request in writing that it be delivered. This amounts in our judgment to an unconstitutional abridgment of

> the addressee's First Amendment rights. The addressee carries an affirmative obligation which we do not think the Government can impose on him."

In *Thomas* v. *Collins,* 323 U.S. 516 (1945), a state statute which required the registration of union organizers was held invalid on the same First Amendment ground. *Cf. Murdoch* v. *Pa.,* 319 U.S. 105 (1943).

In sum, Prince Edward had a First Amendment privilege to remain silent on the question of its belief or non-belief in the values of selective education. Accordingly, the application to it of the obligations of policy adoption and advertising, as given by Rev. Proc. 75-50, was an unconstitutionally void procedure.

B. Under Due Process Concepts the Burden of Coming Forward with Evidence of Discrimination Was on the Service

It is the function of a reviewing court to decide whether the correct rule of law has been applied in a tax proceeding, *Helvering* v. *Rankin,* 295 U.S. 123 (1935); *Hormel* v. *Helvering,* 312 U.S. 552 (1941). And, needless to say, Service procedures must stay within their constitutional powers, *Phillips* v. *C.I.R.,* 283 U.S. 589 (1931).

That being so, it was error for the Court of Appeals and the District Court to have sustained the revocation action of the Service in the absence of any evidence of discrimination on the part of Prince Edward.

Due process in agency proceedings is a Constitutional requirement. It is usually measured by agency conformance to the standards required by the Administrative Procedures Act, 5 U.S.C. § 551 *et seq.* Under that Act a

statutorily granted tax exemption is defined as a license, 5 U.S.C. § 551(8). Once granted, the license becomes a property right and each step required by due process must be observed before it can be taken away, *In re Carter,* 177 F.2d 75, (D.C. Cir. 1949), *cert. den.* 338 U.S. 900.

And, to issue an order without the agency first showing affirmative factual proof of a violation, constitutes a denial of due process, *Garvey* v. *Freeman,* 397 F.2d 600 (8th Cir. 1968). Such evidence on the part of the agency must constitute reasonable proof of the basic facts involved, not a mere statement of the agency's ultimate or statutory conclusion, *Florida* v. *U.S.,* 282 U.S. 194 (1931); *U.S.* v. *Pierce Auto Freight Lines,* 327 U.S. 515 (1946); *Capital Transit Co.* v. *P.U.C.,* 213 F.2d 176 (D.C.Cir. 1954); *American Broadcasting Co.* v. *Fed. Comm. Comm'n.,* 179 F.2d 437, 444 (D.C.Cir. 1949); *Shipley* v. *Pittsburgh & L.E.R. Co.,* 83 F.Supp. 722 (W.D. Pa. 1940).

Therefore, to the extent that Rev. Proc. 75-50 – as applied against Prince Edward – permitted the school's exemption to be revoked without the Service having proven any discriminatory act, it denied Prince Edward the administrative due process to which it was entitled under the Constitution.

CONCLUSION

No agency may alter or burden an order of this Court by adding a condition which the Court has not required, or by changing its import.

26 U.S.C. § 7428 is a review statute. Under its terms the validity of the revocation proceedings of the Service are to be measured against Constitutional standards. Under such

standards the revocation of Prince Edward's tax exempt status for its refusal to adopt and advertise a policy of non-discrimination in education was a violation of its First Amendment right to remain silent on a matter of belief.

A revocation resulting from a shift to the school of the burden of proving non-discrimination, and the freeing of the Service from any obligation to evidence the contrary, denied the school its right to due process in agency proceedings.

The writ of certiorari should be allowed, and on the record the decisions below and the administrative revocation of Prince Edward's tax exempt status should be reversed, its exemption should be reinstated, and its name should be officially republished to that effect.

Respectfully submitted,

Geo S. Leonard
6207 Tally-ho Lane
Alexandria, Virginia 22307
(703) 660-6699

Counsel for Petitioner

September 1980

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NOT TO BE PUBLISHED – SEE LOCAL RULE 8 (f)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1622 **September Term, 1979**

Prince Edward School Foundation,
Appellant

v.

United States of America

Civil Action
No. 78-1103

[Filed Jun 30, 1980 – GEORGE A. FISHER, CLERK]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Before: TAMM and MacKINNON, Circuit Judges and GASCH*, United States District Judge for the District of Columbia

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. While the issues presented occasion no need for an opinion, they have been accorded full consideration by the Court. See Local Rule 13(c). On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court, that the judgment of the District Court appealed from in this cause is affirmed. We concur in the district court's finding that

*Sitting by designation pursuant to 28 U.S.C. §292(a).

"plaintiff has failed to meet its burden of establishing that it is an organization described in section 501(c)(3) and entitled to tax exempt treatment."

Per Curiam
For the Court

/s/ George A. Fisher
George A. Fisher
Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PRINCE EDWARD SCHOOL FOUNDATION	)	
	)	
Plaintiff,	)	
vs.	)	Civil Action
	)	No.78-1103
COMMISSIONER OF INTERNAL	)	
REVENUE SERVICE	)	
Defendant.	)	

MEMORANDUM OPINION

This is a suit for declaratory judgment pursuant to section 7428 of the Internal Revenue Code as amended by section 1306 of the Tax Reform Act of 1976, 90 Stat. 1717[1]

---

[1]Jurisdiction for this suit derives from section 7428 of the Internal Revenue Code and section 1507 of Title 28, United States Code. Those sections provide in pertinent part as follows:

26 U.S.C. § 7428:

(a) Creation of remedy. — In a case of actual controversy involving a (1) determination by the Secretary —

(A)with respect to the initial qualification or continuing qualification of an organization as an organization described in section 501(c)(3) which is exempt from tax under section 170(c)(2), . . .

Upon the filing of an appropriate pleading, the United States Tax Court, the United States Court of Claims, or the district court of the United States for the District of Columbia may make a declaration with respect to such initial classification or continuing classification. Any such declaration shall have the force and effect of a decision of the Tax Court or a final judgment or decree of the district court or the Court of Claims, as the case may be, and shall be reviewable as such . . . .

28 U.S.C. § 1507:

The Court of Claims shall have jurisdiction to hear any suit and issue a declaratory judgment under section 7428 of the Internal Revenue Code of 1954.

Plaintiff seeks a ruling declaring that it is a tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code of 1954. Defendant, in opposition, asserts that the plaintiff is precluded from qualifying as a charitable organization under section 501(c)(3) because it has not established that it administers a nondiscriminatory admissions policy.[2] This ultimate issue is before us on cross-motions for summary judgment.

Factual Background

The pertinent facts are as follows. Plaintiff was formed as a non-profit private school foundation to operate elementary and high schools in Prince Edward County, Virginia. On June 1, 1959, the plaintiff filed its first application with the Internal Revenue Service (hereinafter referred to as the "Service") whereby it sought a ruling from the Service that it was a tax-exempt organization within the terms of section 501(c)(3). By letters of August 6, 1959 and June 10, 1960, the Service tentatively ruled that plaintiff was a tax-exempt organization and qualified for favorable tax treatment. Plaintiff filed a second application for a ruling on its tax-exempt status on August 17, 1960. The Service responded to the plaintiff's applica-

[2] INTERNAL REVENUE CODE § 501, 26 U.S.C. § 501:

(c) List of exempt organizations. . . .

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

tion with a letter on December 22, 1961, indicating that no change in plaintiff's tax-exempt status had occurred since the Service's earlier tentative ruling.

In 1970, the Service announced a new policy to be applied when determining the tax-exempt status of private schools. Under such policy, the Service would not recognize the tax-exempt status of a private school unless the school adopted and administered a non-discriminatory admission's policy and publicized that policy to the community served by the school. *See* Revenue Ruling 71-447, 1972-2 C.B. 230; Revenue Procedure 75-50, 1975-2 C.B. 587. The plaintiff was advised by the Service of its new policy on November 30, 1970. By letter of December 29, 1970, the plaintiff's president responded that the school would continue to have its applications for admission judged by plaintiff's Board of Directors or its agents, and that the plaintiff did not intend to change its existing practices.

On November 3, 1976, after examining plaintiff's information tax return for the fiscal year ending July 31, 1974, a Service revenue agent informed the plaintiff that he *intended to recommend* revocation of the Service's prior tax-exempt rulings. Plaintiff was told that it had not affirmatively shown that its school had adopted a racially non-discriminatory admissions policy, nor had it publicly avowed such a policy. After receiving a second response from the plaintiff informing the Service that it would not change its admission's policy, the Service agent *proposed* revocation of plaintiff's tax-exempt status. On August 2 1978, after exhausting his administrative remedies, plaintiff received a final adverse determination letter from the Service, formally revoking plaintiff's tax exemption.

In support of its motion for summary judgment, the defendant contends that the only issue presented for

resolution by plaintiff's complaint is whether the Service properly concluded that plaintiff is an organization qualifying for tax-exempt status within the meaning of section 501(c)(3). Relying on its contention that schools with discriminatory admissions policies are excluded from those organizations described in section 501(c)(3), the defendant argues that it properly revoked the plaintiff's tax-exempt status because of the plaintiff's failure to affirmatively establish or publicly avow that its admissions policy is nondiscriminatory.

Plaintiff, on the other hand, seeks to challenge the Service's constitutional and statutory authority for revoking plaintiff's tax-exempt status. Specifically, plaintiff contends the Revenue Procedure 75-50, which requires an organization to publicize its policy of nondiscrimination in order to retain its tax exemption, violates the First and Fifth Amendments to the Constitution, as well as the mandates of the Administrative Procedure Act, the Internal Revenue Code of 1954, and the Service's own regulations. In addition, plaintiff argues that the Service has exceeded its authority by attempting to revoke plaintiff's tax exemption retroactively from November 30, 1970.

Before addressing these issues, a brief discussion of the jurisdictional basis for this suit and of our scope of review is appropriate.

Section 7428 Proceedings

Section 7428 of the Internal Revenue Code was enacted to provide a remedy for resolving disputes concerning the initial or continuing qualification by the Secretary of the Treasury of an organization as a tax-exempt organization described in section 501(c)(3) of the Code. The enactment of Section 7428 was Congress' response to two Supreme

Court decisions denying equitable injunctive relief to organizations seeking to restrain the IRS from withdrawing favorable tax-exempt ruling letters. H.Rep.No. 94-658, 94th Cong., 1st Sess. 282 (1976); S.Rep.No. 94-938, 94th Cong., 2d Sess. 585 (1976); *see Bob Jones University v. Simon,* 416 U.S. 725 (1974); *Alexander v. "Americans United," Inc.,* 416 U.S. 752 (1974). The Senate Committee reporting the bill that eventually emerged as section 7428 noted that, although the tax status of an organization is defined by statute and does not depend on the position of the IRS, most organizations find it imperative to obtain a ruling letter from the Service to assure its potential donors that their contributions to the organization will be deductible. S.Rep.No. 94-938, at 585. Noting that the degree of bureaucratic control over an organization's tax-exempt status was susceptible to abuse without review, the Senate Committee recommended the declaratory judgment procedure as a means of enabling an organization to obtain a judicial determination of its own tax-exempt status. *Id.* 586-91.

While providing a remedy to organizations for contesting the Service's tax-exempt status classifications, Congress apparently contemplated that the judicial proceedings would be limited to a judicial review of the Service's ruling for error primarily based upon the administrative record and evidence presented by the organization to the Service. *Id.* at 588.

Our jurisdiction therefore is limited to a review for error of the Service's revocation of plaintiff's favorable tax-exempt ruling. The burden of establishing whether plaintiff is an organization described in section 501(c)(3), furthermore, rests with the plaintiff. *Animal Protection Institute v. United States,* 42 A.F.T.R. 2d 78-5850 (Ct. Cl. Tr. J. Op., Sept. 19, 1978). With these principles in mind, we turn to the arguments presented by the parties.

Private Schools Administering Racially Discriminatory Admissions Policies Are Excluded From Organizations Described in Section 501(c)(3)

In determining whether plaintiff qualifies for favorable tax treatment, our initial inquiry is whether Congress intended to exclude from section 501(c)(3) those private schools that maintain discriminatory admissions policies. In *Green v. Connally,* 330 F. Supp. 1150 (D.D.C. 1971), *aff'd per curiam sub. nom., Coit v. Green,* 404 U.S. 997 (1971), a three-judge panel of this Court ruled that racially discriminatory private schools are not entitled to the favorable tax treatment provided organizations in section 501(c)(3). There, we explained at great length the reasons underlying our decision. We stated that, although no specific language in the statute excludes such organizations, their eligibility for tax-exempt status may be determined by reference to the federal policy underlying federally bestowed tax advantages to educational charities. *Id.* at 1161. After examining federal policy favoring racial desegregation, we concluded that it would be anomalous to permit tax benefits to schools whose practices violate this clearly established policy. *Id.* at 1163. We suggested that federal policy expressed in the Constitution, statutes and court decisions would be otherwise undermined by the legislative grant of tax benefits conferred by section 501(c)(3). *Id.* at 1163-64. It logically follows from our conclusions in *Green* that schools administering a discriminatory admissions policy must be excluded from those organizations described in section 501(c)(3). *Green* is dispositive of the substantive issue underlying this case. In addition to plaintiff's contention that it is entitled as an organization administering a nondiscriminatory admissions policy and therefore entitled to tax-exempt treatment, plaintiff has raised several allegations contesting the validity of the defendant's procedures for determining whether a private school is deserving of the tax-exempt status. Those procedures are set forth in Revenue Procedure 75-50, 1975-2 C.B. 587.

Revenue Procedure 75-50

Revenue Procedure 75-50 requires that a private school seeking tax-exempt status adopt, administer, and publicize its racially nondiscriminatory admissions policy. Plaintiff complains that this requirement that it publicize a nondiscriminatory admissions policy violates its First Amendment right to due process, as well as the statutory mandates of the Administrative Procedure Act and the Internal Revenue Code. These contentions are without merit and immaterial to our determination of plaintiff's tax-exempt status under section 501(c)(3).

The Service, in determining whether to grant or revoke a favorable tax-exempt ruling, has developed guidelines and procedures for organizations to follow in demonstrating that they are organizations described in section 501(c)(3). Revenue Procedure 75-50 is one such guideline and sets forth requirements for private schools to follow in demonstrating that their admissions policies are nondiscriminatory. The revenue procedure, however, does not purport to set forth requirements for exemption under section 501(c)(3). Rather, it acts to put schools on notice that, if they choose not to publicly avow a nondiscriminatory admissions policy or to demonstrate that they have such a policy, the agency may deny them tax-exempt status in a section 7428 proceeding.

Plaintiff's memorandum in support of its motion for summary judgment is devoted in large part to a challenge of the validity of Revenue Procedure 75-50. Even if presented with an invalid revenue procedure, however, the decision for resolution by this court remains whether the plaintiff is a tax-exempt organization under section 501(c)(3). Our ruling upon the constitutionality and statutory validity of Revenue Procedure 75-50 will not affect our ultimate resolution of that question. Revenue Procedure 75-50 simply presents a "litigating position" for the service and does not bear upon our interpretation of

section 501(c)(3)'s prerequisites and plaintiff's failure to meet these requirements. In the context of this case, plaintiff's constitutional claims are not material.[3]

Plaintiff's Qualification as a Tax-Exempt Organization

Upon examination of the administrative record in this proceeding, we conclude that plaintiff has failed to meet its burden of establishing its entitlement to Section 501(c) tax-exempt status. The record is completely devoid of evidence that plaintiff is administering a nondiscriminatory admission's policy. Indeed, all that the plaintiff has alleged with regard to its admissions policy is that its policy is not formalized (Def's Ex. 34) and that decisions on admissions are wholly within the discretion of its Board of Directors (Def's Exs. 8, 34).

Plaintiff concedes that no factual issues remain in dispute regarding their admissions policy. (Def's Ex. 3). It is accordingly undisputed that the plaintiff has never admitted, never received an application from, and thus has never denied admission to a black person. Notwithstanding the absence of direct evidence in either party's favor, it remains the plaintiff's burden to establish that its policy is to admit black students on the same basis as those of other races. The plaintiff has failed to present any evidence to that effect. On the other hand, the inference that plaintiff in fact administers a racially discriminatory policy may be drawn from the circumstances surrounding the school's establishment. The Supreme Court, specifically referring

[3]We reject plaintiff's contention that Revenue Procedure 75-50 is invalid and in contravention of the First Amendment, the Due Process Clause, the APA, and the Service's own regulation, 26 C.F.R. § 601.201 (n)(6)(ii). We also reject as immaterial plaintiff's argument that Revenue Procedure 75-50 is void because its purpose is political rather than revenue producing or because it is not authorized by any section of the Code.

to the plaintiff, described the purpose for plaintiff's establishment to be "to ensure, through measures taken by the county and State, that white and colored children in Prince Edward County would not, under any circumstances, go to the same school." *Griffin v. School Board of Prince Edward County,* 377 U.S. 218, 233, 231 (1964). A further inference that plaintiff administers a racially discriminatory admissions policy can be drawn from the fact that plaintiff has previously conceded that it practiced a racially discriminatory policy of exclusiveness, was subsequently enjoined from such practices by court order, but has failed to present any evidence that it has since modified that policy. *See McCrary v. Runyon,* 363 F. Supp. 1200, 1204 (E.D.Va. 1973), *aff'd,* 427 U.S. 160 (1976).

Plaintiff argues that, because it is subject to the injunction issued in *McCrary v. Runyon, supra,* we should conclude that its admissions policy is nondiscriminatory. We find no reason to draw such a conclusion from the plaintiff's participation in *McCrary.* On the contrary, it would appear incumbent upon the plaintiff, given its concessions that its policies were at one time discriminatory, to establish that it has subsequently reversed that policy.

Plaintiff further contends that the issue of plaintiff's entitlement to tax-exempt status was previously decided in *Griffin v. Board of Supervisors of Prince Edward County,* 322 F.2d 332 (4th Cir. 1963), *rev'd on other grounds,* 377 U.S. 218 (1964). Plaintiff argues that defendant is now estopped from collaterally relitigating the issue in this proceeding. In *Griffin,* relief was sought that would forbid, *inter alia,* the allowance of local tax credits to taxpayers for contributions to schools practicing segregation. *Id.* at 334. The United States appeared only in an *amicus* capacity in order to support the complaint to the extent that it charged Virginia and Prince Edward County supervisors

with racial discriminatory practices. The Prince Edward School Foundation was not even party to that suit. Furthermore, the *Griffin* court never decided the issue now before this court. In *Griffin,* the complaint contested an ordinance adopted by the Prince Edward County Board of Supervisors, not a federal tax-exempt ruling. The ordinance provided credits for taxpayers who contribute to the Prince Edward School Foundation. *Id.* at 399. There, the ordinance was challenged as an indirect method of channeling funds to a segregated school system. *Id.* The court in *Griffin* abstained from deciding whether these tax credits were violative of the Fourteenth Amendment and deferred to the state the resolution of questions concerning the extent to which these and other practices of the state and county amounted to "state action." *Id.* at 340. Clearly the *Griffin* decision, which involved different issues between different parties, has no collateral estoppel affect upon our conclusion that plaintiff's federal tax exemption was properly revoked by the Service.

Retroactive Revocation of Plaintiff's Tax Exemption

Finally, plaintiff alleges that revocation of its tax-exempt status as of November 30, 1970, violates the service's procedural rule governing retroactive revocation of tax exemption rulings. That rule provides that revocation may be retroactive if the organization "omitted or misstated a material fact, operated in a manner materially different from that originally represented, or engaged in a prohibited transaction." 26 C.F.R.. § 601.201 (n)(6)(1)(1978). Defendant, on the other hand, contends that the revocation sought in this case is in accordance with the procedural rules governing the timing of revocations in general. That rule provides that "in any event, revocation or modification will ordinarily take effect no

later than the time at which the organization received written notice that its exemption ruling or determination letter might be revoked or modified." *Id.*

We agree with defendant's contention that revocation as of November 30, 1970, is consistent with this statement of the Service's procedural rules. By letter of November 30, 1970, the Service informed the plaintiff of its change in policy toward schools with racially discriminatory admissions policies. That letter advised the plaintiff that the Service would continue to recognize its tax-exempt status if it adopted or would adopt and administer a nondiscriminatory admissions policy, and if that policy were publicized within the community. It further informed plaintiff that the Service was in the process of reviewing all prior rulings issued to private schools and invited the plaintiff to answer specific questions regarding its own admissions policy. In its response of December 29, 1970, plaintiff declined to answer the questions posed by the Service and stated that it did not intend to change or modify its policies. We are persuaded that plaintiff was placed on notice by the letter of November 30, 1970, that its tax-exempt ruling letter might be revoked or modified.

Conclusion

For the above reasons, we conclude that plaintiff has failed to meet its burden of establishing that it is an organization described in section 501(c)(3) and entitled to tax-exempt treatment. We further conclude that the Service acted properly in revoking plaintiff's exempt status ruling as of November 30, 1970. Accordingly, plaintiff's request for declaratory relief is denied.

An order consistent with the foregoing has been entered this day.

/s/ John H. Pratt
United States District Judge

April 17th, 1979.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PRINCE EDWARD SCHOOL FOUNDATION, *Plaintiff,*	)	File April 18, 1979 JAMES F. DAVEY, Clerk
v	)	Civil Action No. 78-1103
COMMISSIONER OF INTERNAL REVENUE, *Defendant.*	)	

ORDER

This matter having come before the Court upon plaintiff's and defendant's cross-motions for summary judgment, and this Court having considered their motions, memoranda, statements of material facts not in dispute, and the administrative record filed herein, it is this 17th day of April, 1978,

ORDERED that plaintiff's motion for summary judgment be, and hereby is, denied; and it is further

ORDERED that defendant's motion for summary judgment be, and hereby is, granted; and it is further

ORDERED that this action be, and hereby is, dismissed.

/s/John H. Pratt
United States District Court

PRINCE EDWARD SCHOOL FOUNDATION REVOCATION NOTICE

(IRS Bull. No. 40, p. 17, 10/2/78)

Deletions From Cumulative List of Organizations Contributions to Which Are Deductible Under Section 170 of the Code.

Announcement 78-153

The name of an organization that no longer qualifies as organization contributions to which are deductible under section 170 of the Internal Revenue Code of 1954 is listed below.

. . .

Prince Edward School Foundation, Farmville, Va.

Internal Revenue Service Department of the Treasury

Regional Comissioner Mid-Atlantic Region 2 Penn Center Plaza, Phila., Pa. 19102

Prince Edward School Foundation Aug 2, 1978
Post Office Drawer 328
Farmville, Virginia 23901

Gentlemen:

This REVOCATION LETTER is based on a decision made by the Assistant Regional Commissioner, Employee Plans and Exempt Organizations for the Mid-Atlantic Region. This affirms our proposed revocation letter dated February 25, 1977.

Your organization was incorporated as a non-stock and non-profit corporation under the laws of the State of Virginia in 1959. The Articles of Incorporation provide that the corporation shall be organized and operated exclusively for educational purposes and that it is em-

powered to establish, own, and operate, on a non-profit basis, one or more private educational institutions in the County of Prince Edward, Virginia.

You received a tentative ruling of exempt status under Section 501(c)(3) of the Internal Revenue Code of 1954 by a letter dated August 9, 1959. The tentative ruling was affirmed by letters dated June 10, 1960 and December 22, 1961.

You established Prince Edward Academy in 1959. The business and affairs of your organization are managed by a Board of Directors in whom the entire voting power of the organization is vested.

The Internal Revenue Service announced, in 1970, that it would continue to recognize the tax exempt status of a private school provided it has adopted and administers a racially nondiscriminatory admission policy in good faith and had publicized the fact within the community served by the school. The position of the Service was affirmed by Revenue Ruling 71-447, published in October, 1971 and Revenue Procedure 72-54, published in 1972.

Section 501(c)(3) of the Internal Revenue Code provides exemption for organizations organized and operated exclusively for charitable, religious, or educational purposes. Section 1.501(c)(3)-1(d)(3)(i)(a) of the Income Tax Regulations defines education, in part, as "the instruction or training of the individual for the purposes of improving or developing his capabilities."

Revenue Ruling 71-447, 1972-2 C.B. 230, states "a private school that does not have a racially nondiscriminatory policy as to students does not qualify for exemption. The operator of a private school on a racially discriminatory basis is contrary to Federal public policy."

Revenue Procedure 75-50, 1975-2 C.B. 587, sets forth guidelines and record-keeping requirements for private schools to follow in demonstrating that they have the racially nondiscriminatory policy described in Revenue Ruling 71-447, as necessary to exemption under section 501(c)(3) of the Code. Revenue Procedure 75-50 and its predecessor, Revenue Procedure 72-54, 1972-2 C.B. 834, were designed to require private schools to provide information relevant to our determination of exemption under section 501(c)(3) of the Code. It is necessary for a private school to show affirmatively that it has adopted a racially nondiscriminatory policy, that it has made such policy known to the general public, and that it has operated in good faith under such policy.

Based on the fact that you have not complied with the requirements of Revenue Procedure 75-50 nor any of its guidelines that preceded it and have not demonstrated that you have adopted a racially nondiscriminatory policy as to students, we conclude that your Federal income tax exemption under section 501(c)(3) of the Code should be revoked with retroactive effect to all taxable periods beginning after November 30, 1970.

You are, therefore, required to file Federal income tax returns, Form 1120, for all years for which the period of limitation for the assessment of deficiencies in income tax has not expired.

Section 7428 of the Internal Revenue Code, enacted October 24, 1976, entitles you to file a petition for a declaratory judgment in the United States Tax Court, the United States Court of Claims, or the District Court of the United States for the District of Columbia with respect to this determination. Should you wish to file a petition for a declaratory judgment, you must do so within 90 days after the date of this registered letter. You should contact the

appropriate court for information regarding rules for filing petitions for declaratory judgment in Exempt Organizations matters.

Sincerely yours,

/s/Regina M. Deanehan
Regina M. Deanehan
Acting Assistant Regional Commissioner
(Examination)

Internal Revenue Service — Department of the Treasury
Washington, D.C.

Prince Edward School Foundation
PO Box 328
Farmville, Virginia 23901

Person to Contact:
Telephone Number:
Refer Reply to: E:EO:T:R:2-4
Date: MAR 20, 1978

Gentlemen:

We have considered your appeal of the proposed adverse determination regarding your exempt status issued by the District Director, Baltimore, Maryland, by letter dated February 25, 1977, and have concluded that the determination was correct.

A school that does not have a racially nondiscriminatory policy as to students is not charitable within the common law concepts reflected in sections 170 and 501(c)(3) of the Internal Revenue Code and therefore does not qualify as an organization exempt from Federal income tax. Rev. Rul. 71-447, 1971-2 C.B. 230. It is necessary for a private school to show affirmatively that it has adopted a racially nondiscriminatory policy, that it has made such policy known to the general public, and that it has operated in good faith under such policy. See Rev. Proc. 75-50, 1975-2 C.B. 587.

You have not complied with the requirements of Rev. Proc. 75-50 nor any of the guidelines that preceded it and have not demonstrated that you have adopted a racially nondiscriminatory policy as to students.

Accordingly, we are returning your case to the key district office for issuance of a final determination letter.

Sincerely yours,

/s/ E. D. Coleman
E. D. Coleman
Chief, Exempt Organizations
Technical Branch

INTERNAL REVENUE SERVICE
Mid-Atlantic Regional Office

District Director
Baltimore, Maryland

Taxpayer's Name:	Prince Edward School Foundation
Taxpayer's Address:	P.O. Drawer 328 Farmville, VA 23901
Taxpayer's Identification Number:	54-0659818
Years Involved:	FY 72 and subsequent
Date of Conference:	July 21, 1977

Issue

Whether the subject organizations' exemption under IRC 501(c)(3) and 170(b)(1)(a)(ii) should be revoked.

Facts

Prince Edward School Foundation was incorporated as a non-stock and non-profit corporation under the laws of the State of Virginia in 1959. The Foundation's Articles of Incorporation provide that the corporation shall be organized and operated exclusively for educational purposes and that it is empowered to establish, own, and operate, on a non-profit basis, one or more private educational institutions in the County of Prince Edward, Virginia.

The Foundation received a tentative ruling of its exempt status under Section 501(c)(3) of the Internal Revenue Code of 1954 by a letter, dated August 9, 1959. The tentative ruling was affirmed by letters, dated June 10, 1960 and December 22, 1961.

The Foundation established Prince Edwards Academy in 1959. Information indicates that the private school was

established when county officials decided to close the public schools in Prince Edward County rather than to comply with the court-ordered desegregation of the schools.

The business and affairs of the Foundation are managed by a Board of Directors in whom the entire voting power of the corporation is vested. Information indicates that, since the date the school was established, the primary activity of the Foundation has been the maintenance and operation of the school.

At no time since its establishment has the Academy received any application from, or denied admission or employment to, any student or staff applicant of the Negro race. The student body of the Academy presently includes a number of individuals who are members of the races which have been identified by Congress as deprived minorities in the 20 U.S.C. & 1619(9) [sic].

Neither the Foundation nor the Academy has had any taxable income for any reporting period since inception.

The Internal Revenue Service announced, in 1970, that it would continue to recognize the tax exempt status of a private school provided it has adopted and administers a racially nondiscriminatory admission policy in good faith and had publicized the fact within the community served by the school. The position of the Service was affirmed by Revenue Ruling 71-447 published in October 1971 and Revenue Procedure 72-54 published in 1972.

In the course of examination of the Foundation's annual information return, Form 990 for the fiscal year ended July 31, 1974, it was determined that the Foundation has not met the requirements to show affirmatively that the school policy has been made known to the general public.

The Foundation contends that they have not omitted or misstated any material fact, operated in a manner different from that originally represented, nor has either engaged in a prohibited transaction of any type described in 26 CFR Section 601. 201(n)(vii).

Applicable Law

Section 501(c)(3) of the Internal Revenue Code provides exemption for organizations organized and operated exclusively for charitable, religious, or educational purposes. . .

Section 1.501(c)(3)-1(d)(3)(i)(a) of the Income Tax Regulations defines education, in part, as "the instruction or training of the individual for the purpose of improving or developing his capabilities."

Revenue Ruling 71-447, 1972-2 C.B. 230 states "a private school that does not have a racially nondiscriminatory policy as to students does not qualify for exemption. The operation of a private school on a racially discriminatory basis is contrary to Federal public policy."

Rev. Proc. 75-50, 1975-2 C.B. 587, sets forth guidelines and record-keeping requirements for private schools to follow in demonstrating that they have the racially nondiscriminatory policy described in Rev. Rul. 71-447 as necessary to exemption under section 501(c)(3) of the Code. Rev. Proc. 75-50 and its predecessor Rev. Proc. 72-54, 1972-2 C.B. 834, were designed to require private schools to provide information relevant to our determination of exemption under section 501(c)(3) of the Code. The authority for our requiring this information comes from sections 6001 and 6033 of the Code.

Rev. Proc. 72-4 1972-1 C.B. 706, sets forth procedures for processing requests for exemption under section 501 of

the Code. Section 5.01 of Rev. Proc. 72-4 states that the organization if "its application and supporting documents establish that it meets the particular requirements of the section under which exemption is claimed." The Service has a duty to inquire about an applicant organization's operation to insure that exemption is granted only to an organization that meets the particular requirements of the Section under which exemption is sought.

Section 6001 of the Code empowers the Secretary to obtain information in various forms from taxpayers. It provides: "Every person liable for any tax imposed by this title, or for the collection thereof, shall keep such records, render such statements, make such returns and comply with such rules and regulations as the Secretary may from time to time prescribe. Whenever in the judgment of the Secretary it is necessary, he may require any person, by notice served upon such a person or by regulations, to make such returns, render such statements, or keep such records, as the Secretary deems sufficient to show whether or not such person is liable for tax under this title." Section 1.6001-1(c) of the Treasury Regulations states that exempt organizations may be required to substantiate the information required by section 6033 of the Code.

Section 6033 of the Code states in part that "every organization exempt from taxation under section 501(c) shall file an annual return, stating specifically the items of gross income, receipts, and disbursements, and such other information for the purpose of carrying out the Internal Revenue Laws as the Secretary may by forms or regulations prescribe . . ." Section 1.6033-2(h)(2) of the regulations elaborates on the power of the Service to require relevant information. It states: "Every organization which is exempt from tax, whether or not it is required to file an annual information return, shall submit such additional information as may be required by the Internal Revenue

Service for the purpose of inquiring into its exempt status and administering the provisions of subchapter F(section 501 and following), chapter 1 of subtitle A of the Code, section 6033, and chapter 42 of subtitle D of the Code."

Rationale and Conclusion

Based on the fact The Prince Edward School Foundation has not taken any of the affirmative action requirements as outlined in Revenue Procedure 72-54 and 75-50, we conclude that their exemption should be revoked.

The letter dated February 25, 1977 from the District Director, Baltimore, Maryland remains in effect.

If you do not protest the proposed determination in a timely manner, it will be considered by the Internal Revenue Service as a failure to exhaust available administrative remedies. Section 7428(b)(2) of the Internal Revenue Code provides that, "A declaratory judgment or decree under this Section shall not be issued in any proceeding unless the Tax Court, the Court of Claims or the District Court of the District of Columbia determines that the organization involved has exhausted administrative remedies available to it within the Internal Revenue Service."

Department of the Treasury

District Director
Internal Revenue Service

Date: February 25, 1977
(301) 962-3479

In reply refer to: EO:7300:30

Prince Edward School Foundation
P.O. Drawer 328
Farmville, Virginia 23901

Tax Periods Ended: July 31, 1974

Person to Contact: B. Hackerman

We have enclosed a copy of our examination report explaining why we believe an adjustment of your organization's exempt status is necessary.

If you accept our findings, you do not need to take further action. We will send you a modification or revocation letter.

If you do not accept our findings, we recommend that you request a conference with a member of our Regional office conference staff. Your request for a conference should include a written appeal giving the facts, law, and any other information to support your position as explained in the enclosed Publication 898. You will then be contacted to arrange a date for a conference. The conference may be held at the Regional office or, if you request, at any mutually convenient District office. A self-addressed envelope is enclosed.

If we do not hear from you within 30 days from the date of this letter, we will process your case on the basis of the recommendations shown in the examination report. If you have any questions, please contact the person whose name and telephone number are shown above.

If you do not protest this proposed determination in a timely manner, it will be considered by the Internal Revenue Service as a failure to exhaust available administrative remedies. Section 7428(b)(2) of the Internal Revenue Code provides in part that, "A declaratory judgment of decree under this section shall not be issued in any proceedings unless the Tax Court, the Court of Claims, or the district court of the United States for the District of Columbia determines that the organization involved has exhausted administrative remedies available to it within the Internal Revenue Service."

Thank you for your cooperation.

Sincerely yours,

/s/ Gerald G. Portney
District Director

Enclosures:
Examination report
Publication 898
Envelope

Form 4621
(APRIL 1968)

REPORT OF EXAMINATION – EXEMPT ORGANIZATION

ORGANIZATION NAME AND ADDRESS (Number, Street, City or Town, State, ZIP Code)

Prince Edward School Foundation
Post Office Drawer 328
Farmville, Virginia 23901

FORM NUMBER(S)
990

EMPLOYER IDENTIFICATION NO. 54-0659818

TAX YEARS ENDED
7-31-74

AGREEMENT SECURED (Form 990-T or 990-C)
☐ YES ☐ NO

PERSONS WITH WHOM FINDINGS WERE DISCUSSED

Names and Titles
Dr. Roy B. Hargrove, President
Alexander T. Saunders, Attorney-In-Fact

INTERNAL REVENUE AGENT'S NAME	KEY DISTRICT OFFICE	DATE
V. P. Kennedy	Baltimore	12-6-76

RESULTS OF EXAMINATION, AND OTHER INFORMATION

See Attached.

SCHEDULES AND EXHIBITS ATTACHED

None

Prince Edward School Foundation

Year Ended
7-31-74

Prince Edward School Foundation was incorporated as a non-stock and non-profit corporation under the laws of the State of Virginia in 1959. The Foundation's Articles of Incorporation provide that the corporation shall be organized and operated exclusively for educational purposes and that it is empowered to establish, own and operate, on a non-profit basis, one or more private educational institutions in the County of Prince Edward, Virginia.

The Foundation received a tentative ruling of its exempt status under Section 501(c)(3) of the Internal Revenue Code of 1954 by a letter, dated August 9, 1959. The tentative ruling was affirmed by letters, dated June 10, 1960 and December 22, 1961.

The Foundation established Prince Edwards Academy in 1959. Information indicates that the private school was established when county officials decided to close the public schools in Prince Edward County rather than to comply with the court-ordered desegregation of the schools.

The business and affairs of the Foundation are managed by a Board of Directors in whom the entire voting power of the corporation is vested. Information indicates that, since the date the school was established, the primary activity of the Foundation has been the maintenance and operation of the school.

The Internal Revenue Service announced, in 1970, that it would continue to recognize the tax exempt status of a private school provided it has adopted and administers a racially nondiscriminatory admission policy in good faith and has publicized the fact within the community served

by the school. The position of the Service was affirmed by Revenue Ruling 71-447 published in October 1971 and Revenue Procedure 72-54 published in 1972.

In the course of an examination of the Foundation's annual information return, Form 990 for the fiscal year ended July 31, 1974, it was determined that the Foundation has not met the requirements to show affirmatively that the school has adopted a racially nondiscriminatory policy as to students or that such policy has been made known to the general public.

Based on the Foundation's failure to comply with the requirements referred to above, it is recommended that its exempt status be revoked with retroactive effect to the fiscal year ended July 31, 1972. The Foundation is liable to file Federal income tax returns, Form 1120 for each of the subsequent years.

Department of the Treasury

District Director
Internal Revenue Service
Date: November 3, 1976
In reply refer to: EO:7203:WFK

Dr. R.B. Hargrove, Jr.
Post Office Box 247
Farmville, Virginia 23901

Dear Dr. Hargrove:

This is in reply to your request for my proposals to be submitted in writing for presentation to the Board of Directors of the Prince Edward School Foundation.

The Internal Revenue Service announced, in 1970, that it would continue to recognize the tax exempt status of a private school provided it has adopted and administers a racially nondiscriminatory admissions policy in good faith and has publicized the fact within the community served by the school. The position of the Service was affirmed by Revenue Ruling 71-447 published in October 1971 and Revenue Procedures 72-54 and 75-50 published in 1972 and 1975, respectively.

In the course of an examination of the Foundation's annual information return, Form 990, for the fiscal year ended July 31, 1974, it was determined that the Foundation has not met the requirements to show affirmatively that the school has adopted a racially nondiscriminatory policy as to students or that such policy has been made known to the general public.

At the conclusion of the examination in July 1976, you were advised that if the requirements referred to above were complied with at that time my recommendation

would be to continue the recognition of the Foundation's exempt status under Section 501(c)(3) of the Internal Revenue Code of 1954.

After careful reconsideration of the facts and the provisions of the law it is concluded that there is no alternative to recommending that the Foundation's exempt status be revoked with retroactive effect to the fiscal year ended July 31, 1972.

My proposal is subject to approval of the Baltimore Key District Review Staff and to my consideration of any additional information and arguments you may wish to present.

I propose to submit my recommendation by November 19, 1976. You are respectfully requested to present any additional information or arguments before that date.

Sincerely,

/s/ W.F. Kennedy
W.F. Kennedy
Internal Revenue Agent

News
Release

Internal Revenue Service
Washington, DC 20224
Tel: (202) WO 4-4021

For Release: 4:00 PM, EDT,Fri.
July 10, 1970

IRS Announces P sition on Private Schools

Washington, D.C. — The Internal Revenue Service announced today that it has been concluded it can no longer legally justify allowing tax-exempt status to private schools which practice racial discrimination nor can it treat gifts to such schools as charitable deductions for income tax purposes.

The Internal Revenue Service will proceed without delay to make favorable rulings of exemption immediately available to private schools announcing racially nondiscriminatory admissions policies and to deny the benefit of tax-exempt status and deductibility of contributions to racially discriminatory private schools.

The Service said that favorable rulings given to private schools in the past will remain outstanding where the school is able to show that it has racially nondiscriminatory admissions policies.

All private schools with favorable rulings outstanding will receive a written inquiry from the District Director of Internal Revenue and it is anticipated that in most instances evidence of a nondiscriminatory policy can be supplied by reference to published statements of policy or to the racial constituency of the student body.

Where a school fails to establish that it has a racially nondiscriminatory admissions policy, an outstanding ruling of exemption will be withdrawn. However, a school seeking to clarify or change its policies and practices will

be given a reasonable opportunity to do so in order to retain its ruling of federal tax exemption. In any event, full opportunity to present evidence and be heard will be provided in accordance with usual revenue procedures and the right to appeal to the courts will be available. Similar principles will be followed in acting upon requests made by new schools for rulings.

U.S. Constitution – Amendments
(U.S.C.A. Const. Ams. 1-4, p. 5)

I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * *

V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

26 U.S.C. § 501(c)(3)

§ 501. Exemption from tax on corporations, certain trusts, etc.

(a) Exemption from taxation.— An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502 or 503.

* * * * *

(c) List of exempt organizations.—The following organizations are referred to in subsection (a):

* * * * *

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

REV. RUL. 71-447

26 CFR 1.501(c)(3)-1: Organizations organized and operated for religious, charitable, scientific, testing for

public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals.

A private school that does not have a racially nondiscriminatory policy as to students does not qualify for exemption.

Rev. Rul. 71-447

The Internal Revenue Service has been asked whether a private school that otherwise meets the requirements of section 501(c)(3) of the Internal Revenue Code of 1954 will qualify for exemption from Federal income tax if it does not have a racially nondiscriminatory policy as to students.

A "racially nondiscriminatory policy as to students" is defined as meaning that the school admits the students of any race to all the rights, privileges, programs, and activities generally accorded or made available to students at that school and that the school does not discriminate on the basis of race in administration of its educational policies, admissions policies, scholarship and loan programs, and athletic and other school-administered programs.

Section 501(c)(3) of the Code provides, among other things, for the exemption from Federal income tax of organizations "organized and operated exclusively for religious, charitable, * * * or educational purposes."

Section 1.501(c)(3)-1(d)(3)(ii) of the Income Tax Regulations provides that a primary or secondary school that has a regularly enrolled body of students in attendance at a place where the educational activities are regularly carried on may qualify for exemption as an educational organization of the character contemplated by Code section 501(c)(3) if it otherwise meets the requirements of that section.

Under common law, the term "charity" encompasses all three of the major categories identified separately under section 501(c)(3) of the Code as religious, educational, and charitable. Both the courts and the Internal Revenue Service have long recognized that the statutory requirement of being "organized and operated exclusively for religious, charitable, * * * or educational purposes" was intended to express the basic common law concept. Thus, a school asserting a right to the benefits provided for in section 501(c)(3) of the Code as being organized and operated exclusively for educational purposes must be a common law charity in order to be exempt under that section. That Congress had such an intent is clearly borne out by its description in section 170(c) of the Code of a deductible gift to "a corporation, trust, fund, or foundation * * * organized and operated exclusively for educational purposes" as a "charitable contribution." The Service has followed this concept, as is reflected in Rev. Rul. 67-325, C.B. 1967-2, 113, 116-117, which reads:

> * * * (S)ections 170, 2055, 2106, and 2522 of the Code, to the extent they provide deductions for contributions or other transfers to or for the use of organizations organized and operated exclusively for charitable purposes, or to be used for charitable purposes, do not apply to contributions or transfers to *any* organization whose purposes are not charitable in the generally accepted legal sense or to any contribution for any purpose that is not charitable in the generally accepted legal sense. For the same reasons, section 501(c)(3) of the Code does not apply to any such organization.

Also see section 1.501(c)(3)-1(d)(2) and (3) of the regulations; *Amy Hutchinson Crellin* v. *Commissioner,* 46 B.T.A. 1152 (1942), and authorities cited therein.

All charitable trusts, educational or otherwise, are subject to the requirement that the purpose of the trust may not be illegal or contrary to public policy. This principle has been stated as follows in the *Restatement (Second), Trusts* (1959) Sec. 377, Comment c:

> A trust for a purpose the accomplishment of which is contrary to public policy, although not forbidden by law, is invalid.

Although the operation of private schools on a discriminatory basis is not prohibited by Federal statutory law, the policy of the United States is to discourage discrimination in such schools. The Federal policy against racial discrimination is well-settled in many areas of wide public interest as, for example, in transportation, housing, employment, hotels, restaurants and theaters. A recognition of a public interest in eliminating racial discrimination is shown in section 1.501(c)(3)-1(d)(2) of the regulations providing that the "promotion of social welfare" includes activities "to eliminate prejudice and discrimination."

Developments of recent decades and recent years reflect a Federal policy against racial discrimination which extends to racial discrimination in education. Titles IV and VI, The Civil Rights Act of 1964, Public Law 88-352, 78 Stat. 241, 42 U.S.C. 2000c, 2000c-6 and 2000d and *Brown* v. *Board of Education,* 347 U.S. 483, 500 (1954), and many subsequent Federal court cases, demonstrate a national policy to discourage racial discrimination in education, whether public or private.

Rev. Proc. 75-50

SECTION 1. PURPOSE.

.01 This Revenue Procedure sets forth guidelines and recordkeeping requirements for determining whether pri-

vate schools that are applying for recognition of exemption from Federal income tax under section 501(c)(3) of the Internal Revenue Code of 1954, or are presently recognized as exempt from tax, have racially nondiscriminatory policies as to students.

SEC. 2. BACKGROUND.

.01 A school that does not have a racially nondiscriminatory policy as to students does not qualify as an organization exempt from Federal income tax. Rev. Rul. 71-447, 1971-2 C.B. 230.

.02 A school must show affirmatively both that it has adopted a racially nondiscriminatory policy as to students that is made known to the general public and that since the adoption of that policy it has operated in a bona fide manner in accordance therewith.

.03 Internal Revenue Service experience with private schools has shown a need for more specific guidelines to insure a uniform approach to the determination of whether a private school has a racially nondiscriminatory policy as to students.

.04 This Revenue Procedure does not apply to public schools.

SEC. 3. DEFINITIONS.

.01 Rev. Rul. 71-447 states that a racially nondiscriminatory policy as to students means:

> the school admits the students of any race to all the rights, privileges, programs, and activities generally accorded or made available to students at that school and that the school does not discriminate on the basis of race in administration of its educational policies, admissions policies,

scholarship and loan programs, and athletic and other school administered programs.

.02 The Service considers discrimination on the basis of race to include discrimination on the basis of color and national or ethnic origin. A policy of a school that favors racial minority groups with respect to admissions, facilities and programs, and financial assistance will not constitute discrimination on the basis of race when the purpose and effect is to promote the establishment and maintenance of that school's racially nondiscriminatory policy as to students.

.03 A school that selects students on the basis of membership in a religious denomination or unit thereof will not be deemed to have a discriminatory policy if membership in the denomination or unit is open to all on a racially nondiscriminatory basis.

.04 For purposes of this revenue procedure, the term "school" has the same meaning it has in section 170(b)(1)(A)(ii) of the Code.

SEC. 4. GUIDELINES.

.01 *Organizational requirements.* A school must include a statement in its charter, bylaws, or other governing instrument, or in a resolution of its governing body, that it has a racially nondiscriminatory policy as to students and therefore does not discriminate against applicants and students on the basis of race, color, and national or ethnic origin.

.02 *Statement of Policy.* Every school must include a statement of its racially nondiscriminatory policy as to students in all its brochures and catalogues dealing with student admissions, programs, and scholarships. A statement substantially similar to the Notice described in

subsection (a) of section 4.03, *infra,* will be acceptable for this purpose. Further, every school must include a reference to its racially nondiscriminatory policy in other written advertising that it uses as a means of informing prospective students of its programs. The following references will be acceptable:

The M school admits students of any race, color, and national or ethnic origin.

.03 *Publicity.* The school must make its racially nondiscriminatory policy known to all segments of the general community served by the school.

1 The school must use one of the following two methods to satisfy this requirement:

(a) The school may publish a notice of its racially nondiscriminatory policy in a newspaper of general circulation that serves all racial segments of the community. This publication must be repeated at least once annually during the period of the school's solicitation for students or, in the absence of a solicitation program, during the school's registration period. Where more than one community is served by a school, the school may publish its notice in those newspapers that are reasonably likely to be read by all racial segments of the communities that it serves. The notice must appear in a section of the newspaper likely to be read by prospective students and their families and it must occupy at least three column inches. It must be captioned in at least 12 point bold face type as a notice of nondiscriminatory policy as to students, and its text must be printed in at least 8 point type. The following notice will be acceptable:

NOTICE OF
NONDISCRIMINATORY POLICY
AS TO STUDENTS

The M school admits students of any race, color, national and ethnic origin to all the rights, privileges, programs, and activities generally accorded or made available to students at the school. It does not discriminate on the basis of race, color, national and ethnic origin in administration of its educational policies, admissions policies, scholarship and loan programs, and athletic and other school-administered programs.

(b) The school may use the broadcast media to publicize its racially nondiscriminatory policy if this use makes such nondiscriminatory policy known to all segments of the general community the school serves. If this method is chosen, the school must provide documentation that the means by which this policy was communicated to all segments of the general community was reasonably expected to be effective. In this case, appropriate documentation would include copies of the tapes or script used and records showing that there was an adequate number of announcements, that they were made during hours when the announcements were likely to be communicated to all segments of the general community, that they were of sufficient duration to convey the message clearly, and that they were broadcast on radio or television stations likely to be listened to by substantial numbers of members of all racial segments of the general community. Announcements must be made during the period of the school's solicitation for students or, in the absence of a solicitation program, during the school's registration period.

Communication of a racially nondiscriminatory policy as to students by a school to leaders of racial groups as the sole means of publicity generally will not be considered effective to make the policy known to all segments of the community.

* * * * *

.06 *Certification.* An individual authorized to take official action on behalf of a school that claims to be racially nondiscriminatory as to students must certify annually, under penalties of perjury, on an Internal Revenue form to be issued, that to best of his knowledge and belief the school has satisfied the applicable requirements of sections 4.01 through 4.05 of this Revenue Procedure.

* * * * *

.08 *Failure to comply.* Failure to comply with the guidelines will ordinarily result in the proposed revocation of the exempt status of a school in accordance with the procedures set forth in Rev. Proc. 72-4, 1972-1 C.B. 706.

* * * * *

SEC. 9. EFFECTIVE DATE.

.01 Section 4.02 is not applicable until February 4, 1976.

.02 To the extent that the publicity requirements set forth in section 4.03, *supra,* differ from those set forth in Rev. Proc. 72-54, 1972-2 C.B. 834, they shall not be effective until a school's first period of solicitation for students or, in the absence of a solicitation program, during the school's first registration period beginning after November 6, 1975.

.03 The recordkeeping requirements set forth in section *7, supra,* shall not be effective until January 1, 1976.

SEC. 10. EFFECTIVE ON OTHER DOCUMENTS.

Rev. Proc. 72-54 is superseded.

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26 U.S.C. § 7428

§ 7428. Declaratory judgments relating to status and classification of organizations under section 501(c)(3), etc.

(a) Creation of remedy.—In a case of actual controversy involving—

(1) a determination by the Secretary—

(A) with respect to the initial qualification or continuing qualification of an organization as an organization described in section 501(c)(3) which is exempt from tax under section 501(a) or as an organization described in section 170(c)(2),

(B) with respect to the initial classification or continuing classification of an organization as a private foundation (as defined in section 509(a)), or

(C) with respect to the initial classification or continuing classification of an organization as a private operating foundation (as defined in section 4942(j)(3)), or

(2) a failure by the Secretary to make a determination with respect to an issue referred to in paragraph (1),

upon the filing of an appropriate pleading, the United States Tax Court, the United States Court of Claims, or the district court of the United States for the District of

Columbia may make a declaration with respect to such initial qualification or continuing qualification or with respect to such initial classification or continuing classification. Any such declaration shall have the force and effect of a decision of the Tax Court or a final judgment or decree of the district court or the Court of Claims, as the case may be, and shall be reviewable as such. For purposes of this section, a determination with respect to a continuing qualification or continuing classification includes any revocation of or other change in a qualification or classification.

* * * * *

Added Pub.L. 94–455, Title XIII, § 1306(a), Oct. 4, 1976, 90 Stat. 1717.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1622 **September Term, 1979**

Prince Edward School Foundation — Civil Action No. 78-1103

Appellant

v.

United States of America

[Filed Apr 2 1980 — George A. Fisher, Clerk]

BEFORE: Tamm and MacKinnon; Circuit Judges and Gasch,* U.S. District Judge for the District of Columbia.

ORDER

Judgment on the merits of this case is deferred for sixty days from the date of this order to allow the parties to negotiate a mutually satisfactory agreement pronouncing the school's policy on the admission of otherwise eligible minority students.

The parties shall submit a letter to the clerk of this court by the end of the sixty day period informing the court whether an agreement has been reached. Should no acceptable agreement occur, the court will issue its opinion in this matter.

Per Curiam

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER, Clerk

*Sitting by designation pursuant to Title 28 U.S.C. § 292(a).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PRINCE EDWARD SCHOOL FOUNDATION,	:	
Plaintiff,	:	
v.	:	Civil Action No. 78-1103
UNITED STATES OF AMERICA,	:	
Defendant.	:	

AFFIDAVIT OF ROY B. HARGROVE, JR.

State of Virginia)
County of Prince Edward) ss:

ROY B. HARGROVE, JR., being duly sworn, deposes and says:

1. I am and have at all relevant times been the President of the plaintiff Prince Edward School Foundation. As such I am fully familiar with its records and the tax exemption dispute now pending before this court.

2. This affidavit is submitted in support of plaintiff's cross-motion for summary judgment.

3. The Prince Edward Academy does not have a discriminatory admissions policy.

4. The Academy does not claim to be a direct member of the Southern Independent School Association, since only state private school associations are such members. The Academy is, however, a member of the Virginia Independent School Association, which is a state member of the

Southern Independent School Association and as such the Academy was ordered by Judge Bryan in *McCrary* v. *Runyon* to admit any qualified black applicants.

5. Injunction so issued by that court was thereafter affirmed by the Fourth Circuit Court of Appeals and further affirmed by the Supreme Court of the United States in a holding that private schools were free under the First Amendment to believe in or teach the value of separate education, but that their admissions would have to be open to all races.

6. Prince Edward Academy has at all relevant times had an open admissions policy and has conformed to the court's order. While it is true that no negro has since applied for admission to the Academy, no official or personnel related to the Foundation or Academy to my knowledge has ever done or said anything to discourage any such application.

7. It is true as stated in *McCrary* that the Directors of the Foundation retain the belief that separate schooling of the races could be more effective educationally but they are prohibited by the existing injunction from putting this belief into practice.

8. The Academy is in all ways a normal educational organization, highly successful in the training of its students. No change of any kind has been made in the operation of the Academy since its inception.

9. I have read the exhibits attached to Mr. Redd's affidavit and state that the memoranda are correct as to the description of actions attributed to me.

/s/ Roy B. Hargrove, Jr.

Subscribed and Sworn To before me this 5th day of January, 1979.

/s/ Sandra W. Agee
Notary Public

My Commission Expires: May 30, 1979

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PRINCE EDWARD SCHOOL FOUNDATION,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil Action
	:	No. 78-1103
UNITED STATES OF AMERICA,	:	
	:	
Defendant.	:	

AFFIDAVIT OF ROBERT T. REDD

State of Virginia)
County of Prince Edward) ss:

ROBERT T. REDD, being duly sworn, deposes and says:

1. I am and at all relevant times have been the Administrator of the Prince Edward School Foundation. As such I have full knowledge of its operations and tax classifications.

2. Because of the tax distinction between private and non private exempt foundations, by which the latter are favored, I sought a verification of our non private status from the Internal Revenue Service in late 1977 and had this confirmed to me by the Service on December 16, 1977 (Exhibit A).

3. In June and July of 1976 I arranged for Mr. W.F. Kennedy, an auditor from the Exempt Organizations Division of the Internal Revenue Service Office in Richmond, to review all Foundation records. I attach three memoran-

da which I prepared at that time describing the incidents of his audit. As to references contained therein with regard to my own actions I know the statements there made to be true. As to those references to Dr. Hargrove, I believe them to be factually correct, (Exhibits B-1, B-2, B-3).

4. To Mr. Kennedy's knowledge neither the Foundation nor the Academy has ever had nor has any prospect of having, income which would be taxable even in the absence of our exemption.

5. I personally informed Mr. Kennedy that the Supreme Court of the United States had confirmed the permanent injunction issued by the United States District Court for the Eastern District of Virginia in telling the Prince Edward Academy to admit students of all races.

6. At or about that time Mr. Kennedy advised me that despite any ruling of the Supreme Court the regulations and procedures of the Internal Revenue Service would nevertheless require compliance by the Academy with its anti-discrimination publication procedures and that if we made such a public statement, the Service would not interfere with our exemption, otherwise they would take it away.

/s/ Robert T. Redd

Subscribed and Sworn To before me this 5th day of January, 1979.

/s/ Sandra W. Agee
Notary Public

My Commission Expires: May 30, 1979

EXHIBIT A

Department of the Treasury

District Director
Internal Revenue Service

Date: Dec. 16, 1977
In reply refer to: E:EO:7204:B. Zalesch
Telephone: (301) 962-3395

Mr. Robert T. Redd, Administrator
Prince Edward School Foundation
P.O. Drawer 328
Farmville, Virginia 23901

Gentlemen:

This is in reply to your letter dated December 2, 1977, requesting verification of your foundation status for your organization.

Our records disclose that you are not a private foundation pursuant to Section 509(a)(1) and 170(b)(1)(A)(ii) of the Internal Revenue Code of 1954.

If we can be of any further assistance to you, please do not hesitate to call Mrs. Zalesch at (301) 962-3395.

Sincerely yours,

/s/ Gerald G. Portney
Gerald G. Portney
District Director

December 2, 1977

Internal Revenue Service EP-EO Division
Technical and Service Staff
P.O. Box 13163
Baltimore, Maryland 21203

Gentlemen:

The Prince Edward School Foundation is a private, non-profit, non-sectarian school and received its original letter as a tax exempt institution under Section 501(c)(3) of the 1954 Internal Revenue Code on August 6, 1959. This exempt status was confirmed again by letter of June 10, 1960.

We are unable to locate the I.R.S. reply to form 4653 for the purpose of determining our Foundations status as "not a private foundation", and we ask that you please send us a duplicate copy of your notification to this respect.

Our purpose in requesting a duplicate of your ruling as to our status is to supply this information to an organization who is considering a contribution to our Foundation. There is a degree of urgency in this request as we are expected to provide this information before December 31, 1977.

Your prompt attention in forwarding a duplicate of your determination that our Foundation is "not a private foundation" will be greatly appreciated.

Sincerely yours,

Robert T. Redd
Administrator

RTR:swa

EXHIBIT B-1

W.F. Kennedy
E.P./E.O.
P.O. Box 10228
Richmond, Virginia 23240
Phone – 782-2148

NOTES REF. I.R.S.

6-9-76 – Mr. W.F. Kennedy, IRS Tax Exempt Division in Richmond called and asked to speak to Officer of Fd.-Adm. referred Kennedy to R.B.H., Jr. and suggested he call Dr. Hargrove on Friday, June 11. Kennedy called Dr. Hargrove on June 11th but Dr. Hargrove was out of town – Finally completed call on Monday, June 14th.

6-14-76 – Kennedy to Dr. Hargrove wanted to advise that P.E.S.F. was selected as tax exempt org. for review of 1973-74, Aug. 1973 - July 31, 1974.

6-14-76 – Kennedy called Administrator indicating he had talked to Dr. Hargrove and wished to set up appointment to visit Foundation Office. Wants to review the following:

1. Articles of Incorporation
2. By-laws
3. Official minutes Aug. 1, 1973 - July 31, 1974
4. Auditors Report
5. Ledger

Kennedy requested Administrator to forward copy of Form 990, Return for Tax Exempt Corp. for his review prior to conference on 6-29-76. Administrator received permission from Dr. Hargrove to forward.

Appointment scheduled Tuesday, June 29, 1976

EXHIBIT B-2

NOTES REFERENCE I.R.S.
6-29-76

Mr. W.F. Kennedy, I.R.S. Tax Exempt Division in Richmond, visited Foundation Office on June 29, 1976. (10:15 a.m.)

Mr. Kennedy reviewed the following:

1. Articles of incorporation
2. Bylaws
3. Official minutes 8-1-73 to 7-31-74 (provided with minute book through 6-76)
4. Form 990 from 1970-71 through 1974-75
5. Auditors reports – 1971-1975
6. Ledger – 1973-1974
7. I.R.S. file with correspondence

Following review of foregoing, Mr. Kennedy requested conference with administrator with specific questions reference:

1. Procedure for scholarship program
2. Procedure for Virginia Supplemental Retirement System
3. Hospitalization insurance (if Foundation contributed)
4. Tax Sheltered Annuity
5. $500.00 payment to Farmville Land Co. (purchase .26 acres for band room)
6. Check to Hotel Weyanoke (pre-commencement dinner)
7. No record in files reference I.R.S. Questionnaire supposedly mailed to us in November, 1970. I.R.S. Evaluation of Questionnaire would have determined if Foundation had discriminating admission

policies. Administrator assured Mr. Kennedy that he had no knowledge of such Questionnaire being received but did recall letter to I.R.S. about that time, as the result of an inquiry, explaining that our admission policies were the same as those adopted when our Foundation first received tax exempt certificate.

Mr. Kennedy appeared satisfied with his evaluation and conference. He indicated that he would make his report to Baltimore and would contact us if additional information was required.

EXHIBIT B-3

NOTES REFERENCE I.R.S.
TELEPHONE CONVERSATION W.F. KENNEDY
& ROBERT T. REDD
July 7, 1976

Mr. W.F. Kennedy called Administrator and stated that he had secured our I.R.S. file from the Baltimore office. Upon reviewing this file, he found a letter from Foundation dated December 28, 1970, which read as follows:

> "Each application for admission to the Prince Edward School Foundation is accepted or rejected according to the judgment of the Board of Directors or its agents.
>
> The Prince Edward School Foundation does not intend to change or modify its present policies.
>
> This information was given to you by letter to Mr. John R. Barber, Chief Ruling Section, Exempt Organizations Branch, dated October 6, 1967."

This letter was attached to Questionnaire to which he referred on his June 29th visit. Though he had no certain knowledge, he assumed that the Foundation failed to complete the Questionnaire but returned same with the covering letter above.

Mr. Kennedy stated that an I.R.S. evaluation of the completed Questionnaire would have determined if Foundation could remain tax exempt or if a change in admission policies were required.

Mr. Kennedy indicated that in the absence of the completed Questionnaire, which is a necessary part of our I.R.S. file, he could offer our Foundation two alternatives:

1. Adopt and properly publicize an open admissions policy
2. Recommend revocation of tax exempt certificate under section 501(C)(3)

The Administrator asked if this was now a "moot" question in view of Runyon vs. McCrary – Mr. Kennedy stated that it may appear impertinent in view of Supreme Court decision but the fact remained that the court decision had no effect upon I.R.S. Rulings and Regulations.

The Administrator asked Mr. Kennedy if, in publishing an open admissions policy, a newspaper article in Farmville Herald covering 5-7 counties would be sufficient. Mr. Kennedy stated that he saw no reason why this procedure would not be adequate. (Would need to send copy to him)

The Administrator referred Mr. Kennedy to Dr. Hargrove as President of Foundation, and requested that he discuss these alternatives with him since this was a policy matter that would involve action by the Board of Directors.

Mr. Kennedy stated that he would contact Dr. Hargrove within next few days.

No. 80-484

In the Supreme Court of the United States

OCTOBER TERM, 1980

PRINCE EDWARD SCHOOL FOUNDATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of the dismissal of its suit for a declaratory judgment under Section 7428 of the Internal Revenue Code of 1954 (26 U.S.C.) seeking reinstatement of its tax-exempt status as an organization operated exclusively for "educational purposes" under Section 501(c)(3) of the Code.

The pertinent facts are as follows: Petitioner was formed in 1959 as a nonprofit corporation to operate private elementary and secondary schools. The Internal Revenue Service ruled in that year, on a tentative basis,[1]

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[1] The prior practice of the Internal Revenue Service was to issue tentative determination letters to educational institutions and certain other organizations when the organization claiming exemption had been in active operation for less than one year at the time it submitted its application. See Rev. Rul. 54-164, 1954-1 Cum. Bull. 88.

that petitioner qualified for exemption under Section 501(c)(3) and was eligible to receive tax-deductible contributions. Letters issued to petitioner in 1960 and 1961 confirmed that its exempt status continued to be recognized in accordance with the initial tentative ruling (Pet. App. 4a-5a, 16a-17a).

By letter dated November 30, 1970, the Internal Revenue Service advised petitioner that thereafter it would not recognize as exempt any private school that failed to adopt and administer in good faith a racially nondiscriminatory admissions policy. Petitioner's president responded that each application for admission was accepted or rejected according to the judgment of its directors and their agents, and that it did not intend to change its existing admissions policy. On a subsequent audit, the examining agent determined that petitioner had failed to demonstrate that it had adopted a nondiscriminatory policy. The Internal Revenue Service accordingly proposed revocation of petitioner's exemption and, after petitioner had exhausted its administrative remedies, revoked the exemption retroactively to November 30, 1970. As stated in the notice of final determination, the revocation was based on petitioner's failure to satisfy the requirements of Revenue Procedure 75-50[2] and to demonstrate that it had adopted a racially nondiscriminatory policy (Pet. App. 5a, 16a-19a, 56a-57a).

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[2]Rev. Proc. 75-50, 1975-2 Cum. Bull. 587, sets forth the guidelines by which the Internal Revenue Service determines whether private schools seeking tax-exempt status have racially nondiscriminatory policies as to students, *e.g.*, (§ 2.01): "A school that does not have a racially nondiscriminatory policy as to students does not qualify as an

Petitioner thereupon instituted this suit in the United States District Court for the District of Columbia under Section 7428 of the Code for a declaratory judgment to reinstate its status as a tax-exempt organization. On the parties' cross-motions for summary judgment, the district court entered judgment for the government on the ground that petitioner had not carried its burden of proving its entitlement to tax-exempt treatment. The court found that petitioner had failed to establish that it was administering a racially nondiscriminatory admissions policy (Pet. App. 3a-4a, 10a-11a, 13a). The court of appeals affirmed per curiam (Pet. App. 1a-2a).

In *Green* v. *Connally*, 330 F. Supp. 1150, 1179 (D.D.C.), aff'd, 404 U.S. 997 (1971), the court held a private school is not entitled to acquire or retain exempt status under Section 501(c)(3) of the Code unless it has a racially nondiscriminatory policy. As in any tax case, the burden of overcoming the Commissioner's determination that a private school does not have a nondiscriminatory policy is upon the school. The legislative history accompanying the enactment of Section 7428 makes clear

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organization exempt from Federal income tax." The Revenue Procedure further provides (§ 2.02):

> A school must show affirmatively both that it has adopted a racially nondiscriminatory policy as to students that is made known to the general public and that since the adoption of that policy it has operated in a bona fide manner in accordance therewith.

The Revenue Procedure thereupon sets forth a number of specific requirements that must be met by each school seeking to demonstrate that it has adopted a nondiscriminatory policy and is operating in accordance with that policy, *viz.*, the school must state in its charter, documents and catalogues that it has adopted a nondiscriminatory policy; publicize the policy at least once annually so as to effectively bring it to the attention of all racial segments of its community; and maintain records documenting, among other things, the racial composition of its students, faculty, and administrative staff.

that out of deference to the Tax Court's expertise regarding declaratory judgments in tax cases, and in the interest of creating a unified body of national precedents, the district court and Court of Claims should conform their practice in Section 7428 proceedings to the rules evolved by the Tax Court. H.R. Rep. No. 94-658, 94th Cong., 1st Sess. 285-286 (1976); S. Rep. No. 94-938, 94th Cong., 2d Sess. 588 (1976). See *Animal Protection Institute, Inc.* v. *United States*, 42 A.F.T.R.2d 78-5850, 78-5854 to 78-5855 (Ct. Cl. Sept. 19, 1978). The district court's allocation of the burden of proof was accordingly governed by the Tax Court Rules applicable to declaratory judgment actions, which impose on the plaintiff the burden of proof with respect to the grounds set forth in the Commissioner's notice of determination. Rules of Practice and Procedure of the United States Tax Court (Jan. 1, 1974 (Sept. 30, 1977 amendment), Rule 217(c).

The courts below correctly held that petitioner did not meet its burden of proof. In *Griffin* v. *School Board*, 377 U.S. 218, 223, 231 (1964), this Court noted that petitioner was formed to operate private schools for white children in Prince Edward County as part of a design to "ensure * * * that white and colored children in Prince Edward County would not, under any circumstances, go to the same school." As petitioner concedes (see Pet. 3-4) and the district court found (Pet. App. 11a), petitioner was among the schools participating as intervenors in *Runyon* v. *McCrary*, 363 F. Supp. 1200 (E.D. Va. 1973), aff'd, 427 U.S. 160, 164 (1976). In the trial court in that case, it was conceded that these schools made race a factor in their "policies of exclusiveness." 363 F. Supp. at 1203. The record here is devoid of evidence suggesting that petitioner has taken any steps, whether by objective act or formal declaration, to dispel its "reputation" (Pet. 3) and

open its facilities to blacks on a nondiscriminatory basis. In almost twenty years of operation it has never enrolled or even received an application from a black child (Pet. App. 10a). Indeed, in a memorandum included in the administrative record in this case (A. 44),[3] petitioner conceded that it has not adopted a racially nondiscriminatory policy.

Petitioner seeks to excuse its failure to make the requisite showing (Pet. 10-12, 16-18, 19-20) on the grounds that its directors may have (Pet. 16) a First Amendment right to their belief in the value of segregated education. But that constitutional principle does not guarantee petitioner a right to tax-exempt status. By requiring petitioner to demonstrate that it is operating under a racially nondiscriminatory policy, the court below did not encroach upon any activity entitled to affirmative constitutional protection. See *Norwood* v. *Harrison*, 413 U.S. 455, 469-471 (1973); *Runyon* v. *McCrary, supra,* 427 U.S. at 175-176.

Nor does the outcome of this proceeding turn, as petitioner contends (Pet. 12-15), upon the propriety of the guidelines used by the Internal Revenue Service to rule on the exempt status of private schools.[4] While recognizing that these guidelines represent the position of the Commissioner (cf. *Dixon* v. *United States*, 381 U.S. 68, 72-75 (1965)), the district court entered judgment against

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[3] "A." refers to the separately bound record appendix filed in the court of appeals.

[4] The requirements of Rev. Proc. 75-50 which petitioner challenges are, in any event, fully in keeping with those the court in *Green* v. *Connally*, *supra*, 330 F. Supp. at 1177, 1179-1180, prescribed as necessary to safeguard the rights of black schoolchildren.

petitioner below on the ground that it had failed to show that it had adopted a racially nondiscriminatory policy, as required for tax-exempt status under Internal Revenue Code Section 501(c)(3). Petitioner's arguments as to the correctness of the guidelines are irrelevant.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

OCTOBER 1980

DOJ-1980-10